

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**EVA J. TWITCHELL**  
Claimant

VS.

**ACME FOUNDRY, INC.**  
Self-Insured Respondent

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Docket Nos. 1,013,328  
& 1,024,037<sup>1</sup>

**ORDER**

Claimant appealed the January 26, 2011, review and modification Award<sup>2</sup> entered by Administrative Law Judge (ALJ) Thomas Klein. The Workers Compensation Board heard oral argument on June 22, 2011. Gary R. Terrill of Overland Park, Kansas, was appointed as a Board Member Pro Tem in this matter.

**APPEARANCES**

Kala Spigarelli of Pittsburg, Kansas, appeared for claimant. Paul M. Kritz of Coffeyville, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the January 26, 2011, Award and the February 22, 2007, Award. At the post-award hearing, the ALJ indicated the regular hearing transcript and any preliminary hearing transcripts and

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<sup>1</sup> Only Docket No. 1,013,328 is in the caption of ALJ Klein's January 26, 2011, Award and claimant's subsequent Application for Review, but the original Award and subsequent Order by the Board were entered under, and the applications for review and modification were filed in, Docket Nos. 1,013,328 and 1,024,037. Further, the ALJ states at page 4 of the July 21, 2009, post-award hearing transcript: "[T]his is case number 1,013,328, and 1,024,037, they are both scheduled up for a review and mod. today."

<sup>2</sup> Although the January 26, 2011, Award is entitled Post-Award Medical Award, this is a review and modification proceeding.

all deposition transcripts were part of the evidentiary record.<sup>3</sup> The ALJ's review and modification Award indicates only the July 21, 2009, post-award hearing transcript, the transcript of the September 11, 2009, deposition of Dr. Edward J. Prostic and the transcript of the October 14, 2009, deposition of Jerry D. Hardin are part of the record.<sup>4</sup> At oral argument before the Board the parties agreed that the regular hearing transcript and any preliminary hearing transcripts and all deposition transcripts are part of the record.

In the January 26, 2011, review and modification Award, the ALJ found that the permanent impairment to claimant's left knee has increased to 50%. At oral argument before the Board respondent's counsel stipulated that if the Board finds the increase in claimant's left knee impairment resulted from her original injury, respondent would not dispute claimant has a 50% permanent impairment of the left knee.

### ISSUES

In the January 26, 2011, Award, ALJ Klein determined (1) claimant was not permanently and totally disabled, (2) claimant's left lower extremity functional impairment has increased to 50% as a natural consequence of her work-related accident, and (3) claimant was entitled to modification of her award based on a 50% functional impairment to her leg.

Claimant contends she is permanently and totally disabled. Claimant argues that respondent has not presented any evidence to support a claim that claimant is able to work and, pursuant to Kansas law, claimant maintains she has met her burden of proving permanent total disability.

Respondent contends that considering only claimant's bilateral carpal tunnel injuries (Docket No. 1,013,328) or her left knee injury (Docket No. 1,024,037), claimant is capable of engaging in substantial and gainful employment. Respondent argues that neither one of claimant's "single injuries," as contemplated by *Casco*,<sup>5</sup> caused her to become permanently and totally disabled and it asserts that combining claimant's injuries is not a valid basis for consideration of a permanent total disability award. Respondent maintains it has rebutted the presumption of permanent total disability with regard to the bilateral upper extremity claim and that the provisions of K.S.A. 44-510c do not apply to the knee claim as the claim relates to one knee only.

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<sup>3</sup> P.A.H. Trans. at 5-6.

<sup>4</sup> ALJ Award (Jan. 26, 2011) at 1.

<sup>5</sup> *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

Respondent argues that claimant has not sustained her burden of proving the increased impairment for claimant's left knee is related to the accident as opposed to the natural progression of her preexisting degenerative condition. As indicated above, at oral argument before the Board respondent's counsel stipulated that if the Board finds the increase in claimant's left knee impairment resulted from her original injury, respondent would not dispute claimant has a 50% permanent impairment of the left knee.

The issues before the Board on this appeal are:

1. Is claimant permanently and totally disabled as a result of the injuries she suffered in both claims?
2. Is claimant entitled to additional compensation for increased impairment to her left knee in Docket No. 1,024,037?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the parties' arguments, the Board finds and concludes:

A brief history of this claim is helpful to understand the issues. Claimant is a high school graduate, attended college for one year and in the past had certified nursing assistant and certified medical assistant certificates. She is 57 years of age. In Docket No. 1,013,328, claimant alleged an injury to both upper extremities as a result of repetitive use culminating on July 21, 2003. In Docket No. 1,024,037, claimant alleged she fell at work in December 2004 and injured both knees.

Dr. Edward J. Prostic, an orthopedic physician, examined claimant on November 29, 2004, and January 10, 2006. Dr. Prostic opined claimant had a 35% permanent impairment to the left leg, a 20% permanent impairment to the right leg, a 25% permanent impairment to the right upper extremity and a 30% permanent impairment to the left upper extremity using the *AMA Guides*.<sup>6</sup>

Dr. Prostic examined claimant on three occasions. Only the report dated November 29, 2004, contains restrictions for claimant. However, these restrictions were made prior to the date claimant reached maximum medical improvement. At his first deposition, Dr. Prostic was not asked about restrictions for claimant.

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<sup>6</sup> Prostic Depo. (June 20, 2006) at 19-20. The *AMA Guides* refers to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

On March 11, 2005, ALJ Thomas Klein appointed Dr. J. Mark Melhorn, an orthopedic hand specialist, to examine and treat claimant's upper extremities. Dr. Melhorn provided claimant treatment from April 19, 2005, through November 28, 2005 (the date Dr. Melhorn indicated claimant reached maximum medical improvement), for her upper extremity problems. Dr. Melhorn restricted claimant to working no more than 40 hours per week with task rotation and assigned claimant a 3.25% permanent impairment to each upper extremity. Dr. Melhorn provided treatment to claimant's right shoulder and neck, but provided no permanency ratings for the neck or shoulder.

In a February 22, 2007, Award, Special Administrative Law Judge (SALJ) Marvin Appling found that claimant had a 17% permanent impairment to the left arm and a 21% permanent impairment to the left leg. On July 17, 2007, this Board entered an Order modifying the SALJ's Award. In Docket No. 1,013,328, the Board averaged Dr. Prostic's 30% permanent impairment to claimant's left upper extremity with the 3.25% permanent impairment of Dr. Melhorn for a 16.63% permanent impairment to the left forearm. The Board then averaged the 25% permanent impairment assigned by Dr. Prostic to claimant's right upper extremity with Dr. Melhorn's permanent impairment of 3.25% for a 14.13% permanent impairment to the right forearm.

Dr. Prostic testified that in January 2006 he rated claimant's upper extremities, which included "... a combination of rotator cuff tendonitis, lateral epicondylitis of the right, medial epicondylitis of the left, ulnar entrapment of the left shoulder and median nerve of both wrists."<sup>7</sup> Dr. Melhorn indicated claimant had subjective complaints of shoulder pain. He did not agree with Dr. Prostic's diagnosis of thoracic outlet syndrome and rotator cuff irritability.<sup>8</sup>

In Docket No. 1,024,037, the Board found claimant's right knee injury was not work related, but that claimant suffered a left knee injury by accident that arose out of and in the course of her employment. The Board averaged the 16% permanent impairment to the left lower extremity assigned by Dr. Kevin M. Mosier and the 35% permanent impairment rating assigned by Dr. Prostic for a 25.5% permanent impairment to the left lower extremity at the level of the knee.

Claimant asserted to the Board that she was entitled to work disability benefits or permanent total disability benefits, alleging she was fired after the case was submitted and no longer able to work. This Board determined that claimant was not entitled to such benefits as there was no evidence within the record to substantiate her claim and *Casco*<sup>9</sup> limited claimant's recovery to separate scheduled impairments unless permanent total

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<sup>7</sup> Prostic Depo. (Sept. 11, 2009) at 10.

<sup>8</sup> Melhorn Depo. at 22-23.

<sup>9</sup> *Casco*, 283 Kan. 508.

disability as a result of a parallel injury could be established. The Board indicated the evidence within the record was that following both accidents, claimant returned to her normal work duties without accommodation. Following *Casco*, this Board awarded claimant disability benefits for three separate scheduled impairments (at the levels of the left forearm, right forearm and left leg).

On April 8, 2008, claimant filed applications for review and modification in both claims. Claimant asserts that her permanent impairments have increased and she is permanently and totally disabled. Respondent counters by arguing claimant suffered bilateral carpal tunnel injuries in Docket No. 1,013,328, and that these injuries do not render claimant permanently and totally disabled. Respondent contends that the knee injury claimant suffered is separate and distinct and should not be considered in determining whether claimant is permanently and totally disabled. The ALJ concurred and stated in the January 26, 2011, review and modification Award: "The Court finds that since the claimant's alleged permanent and total disability is not derived from one of her specific scheduled injuries, but a combination of the affects of two or more separate scheduled injuries, she is not permanently and totally disabled."<sup>10</sup>

After both of her accidents, claimant returned to her normal work duties as an inspector. Claimant's job as an inspector required her to look at a part through a scope and use wires to make tools go inside the part to clean it. Claimant testified that when she inspected parts, she would use her arms repetitively, performing these duties the entire workday unless grinding parts with a hand grinder.

Claimant indicated she was prescribed Lortab and morphine for her knees and arms through a family medicine clinic not authorized by respondent. Claimant alleged that she frequently fell asleep at work as a result of taking pain medication and she would wake up frequently at night because of pain caused by her injuries. In the 3-4 months before she was terminated, claimant fell asleep nearly every day. When her foreman caught her sleeping, claimant was told to go home. On February 13, 2007, claimant's foreman again caught her sleeping and claimant refused to go home. The next day she was terminated. After being terminated, claimant indicated she looked for work, but could not find a job. Claimant was approved in August 2007 to receive Social Security disability benefits.

Prior to being terminated, claimant indicated she did not think she was going to be able to work much longer because her hands, arms, and legs hurt. Claimant testified she went to the nurse's station a lot until she was told by her supervisor that if she wanted to see the nurse, it would have to be after work. Claimant testified she is in need of medical treatment, with her biggest problem being her left knee. Claimant indicated she was also having problems with both shoulders.

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<sup>10</sup> ALJ Award (Jan. 26, 2011) at 2.

On February 24, 2009, claimant was again examined by Dr. Prostic. He had new x-rays taken of claimant's left knee. Dr. Prostic noted in his February 24, 2009, report that claimant had obvious progression of osteoarthritis of her left knee and she needed a total knee replacement. He acknowledged claimant was headed for that procedure sooner or later.<sup>11</sup> Dr. Prostic opined that the impairment to claimant's left lower extremity is now in excess of 50%. He opined that if claimant has a left total knee replacement, an ideal result of her surgery would equate to a 37% permanent impairment, but her permanent impairment would stay about the same if the results are fair and increase with a poor result.

Dr. Prostic opined the permanent impairments for claimant's upper extremities have increased, but he could not quantify the impairments because he did not record a detailed examination of claimant's shoulders. Dr. Prostic also indicated claimant is more than moderately obese, has vascular disease, chronic low back pain, myofascial back pain, sacroiliac joint arthritis, osteoarthritis and spinal stenosis.

Dr. Prostic opined claimant is now totally disabled from gainful employment because of a combination of severe difficulties with her left knee as well as her upper extremity problems.<sup>12</sup> When rendering the foregoing opinion, Dr. Prostic indicated he took into consideration claimant's age, education and work experience. Dr. Prostic testified that taken by itself, claimant's left knee condition is not causing her to be totally disabled from gainful employment. He further testified that taken by itself, claimant's bilateral carpal tunnel syndrome is not causing claimant to be totally disabled from gainful employment. He also opined that if claimant responded favorably to treatment, "There are some things that she could do."<sup>13</sup>

Jerry D. Hardin, a personnel consultant, saw claimant on July 31, 2006. After claimant was discharged by respondent, Mr. Hardin was asked by claimant to render an opinion as to her ability to work. After receiving additional information from claimant's attorney, including Dr. Prostic's February 24, 2009, report, but without interviewing claimant again, Mr. Hardin opined that claimant is essentially and realistically unemployable. Mr. Hardin testified as follows:

Q. (Mr. Kritz) Mr. Hardin, is your opinion that she has 100 percent loss and is essentially and realistically unemployable, is that strictly based on Dr. Prostic's opinion?

A. (Mr. Hardin) And my interview with her and my knowledge of all the injuries that have taken place with her. When she was here in my office, she was using a cane

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<sup>11</sup> Prostic Depo. (Sept. 11, 2009) at 11-12.

<sup>12</sup> *Id.*, at 6.

<sup>13</sup> *Id.*, at 18.

to really barely walk. Of course, that was some years ago. So I don't know her current picture. But based on Dr. Prostic's current restrictions and my knowledge of her and what has taken place, that is my opinion.<sup>14</sup>

**Is claimant entitled to permanent total disability compensation?**

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

Claimant alleges that the functional impairment to her upper extremities has increased, as has the functional impairment to her left knee. She asserts she is now permanently and totally disabled. Respondent argues that in order for claimant to be eligible for permanent total disability benefits, claimant's disability must result from a single injury. Respondent acknowledges that claimant's bilateral upper extremity injuries constitute a "single injury" for purposes of determining if claimant is permanently and totally disabled. Respondent contends claimant is not permanently and totally disabled, but if she is, her permanent total disability results from two separate and distinct injuries.

Casco<sup>15</sup> provides:

The language in K.S.A. 44-510c(a)(2) requires that the disability result from a single injury. Here, that condition is satisfied by the application of the secondary injury rule. Because the injury to Casco's right shoulder is a natural and probable consequence of the injury to his left shoulder, we conclude that the disability in both of his arms is the result of a single injury.

When a single injury causes the claimant to suffer the loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof, we apply the *Pruter* analytical model. Our analysis begins with determining whether Casco is permanently and totally disabled. See *Pruter*, 271 Kan. at 875. Because Casco suffers from the loss of both arms, K.S.A. 44-510c(a)(2) establishes a rebuttable presumption that he is permanently, totally disabled. If that presumption is not

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<sup>14</sup> Hardin Depo. (Oct. 14, 2009) at 10-11.

<sup>15</sup> *Casco*, 283 Kan. 508.

rebutted by evidence in the record, Casco's compensation must be calculated in accordance with K.S.A. 44-510c as a permanent total disability.<sup>16</sup>

In Docket No. 1,013,328 and *Casco*, both claimants suffered a single injury to both upper extremities that resulted in a permanent functional impairment. Claimant alleges she suffered a loss of use of both arms and that K.S.A. 44-510c(a)(2) creates a rebuttable presumption that the claimant is permanently and totally disabled. Claimant asserts that respondent has failed to rebut this presumption. This is the same argument that was raised in *Casco*.

Claimant cites the *Loyd*<sup>17</sup> case in support of her contention that whether a claimant is permanently and totally disabled is a question of fact to be determined by the totality of the circumstances. This Board acknowledges that a claimant's age, restrictions, education and work experience should be considered to determine if he or she is permanently and totally disabled. In *Wardlow*,<sup>18</sup> the Kansas Court of Appeals found the totality of a claimant's circumstances pertinent in determining if he or she is permanently and totally disabled. This does not negate the requirement of K.S.A. 44-510c(a)(2) that a permanent and total disability must result from a single injury.

*Bergstrom*<sup>19</sup> requires a literal reading of K.S.A. 44-510c(a)(2). In order to be entitled to a presumption of permanent total disability, the loss of the multiple scheduled members must result from a single injury. To determine otherwise would be contrary to *Bergstrom*. A claimant cannot combine the injuries from several claims to be eligible for the presumption of permanent total disability in K.S.A. 44-510c(a)(2), but a claimant's entire condition including restrictions from prior injuries can be considered in determining whether a claimant is permanently and totally disabled.

The Board recognizes there is a rebuttable presumption in Docket No. 1,013,328 that claimant is permanently and totally disabled. But claimant is not entitled to obtain an award of permanent total disability by aggregating her injuries in Docket Nos. 1,013,328 and 1,024,037 because the knee injury in Docket No. 1,024,037 constituted a subsequent intervening accident and is not a part of the injuries claimed in Docket No. 1,013,328.

Respondent has the burden of rebutting the presumption that claimant is permanently and totally disabled as a result of her injury in Docket No. 1,013,328.

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<sup>16</sup> *Id.*, at 528-529.

<sup>17</sup> *Loyd v. Acme Foundry, Inc.*, 217 P.3d 1018, 2009 WL 3378206 (No. 100,695, Kansas Court of Appeals unpublished opinion filed Oct. 16, 2009).

<sup>18</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

<sup>19</sup> *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).



Claimant relied on the testimony and opinions of Dr. Prostic and Mr. Hardin that she is permanently and totally disabled. Dr. Prostic could not quantify the amount that claimant's upper extremity permanent impairments increased. Dr. Prostic admitted on cross-examination that by itself and without considering claimant's subsequent knee injury, the injuries to claimant's upper extremities did not render her totally disabled from gainful employment.

In a report dated February 24, 2009, Dr. Prostic gave claimant no specific restrictions. The report indicated<sup>20</sup> and Dr. Prostic testified<sup>21</sup> that claimant is realistically unemployable. However, Dr. Prostic did testify claimant can continue to perform some job tasks on an occasional basis, including keying, handwriting and gripping, and she could answer the phone. He opined claimant can do cleanup involving objects weighing one to two pounds as long as it is not repetitious and is performed in a position of comfort.

*Lloyd and Casco* require that when determining if a worker is permanently and totally disabled, the fact finder should consider a claimant's entire condition at the time the injury occurred. When claimant suffered her injury in Docket No. 1,013,328, she had not suffered a serious left knee injury. Dr. Prostic testified that claimant's bilateral carpal tunnel syndrome by itself would not cause her to be totally disabled from working. Also significant is that Dr. Prostic could not quantify any increase in impairment to claimant's upper extremities.

It is significant that Dr. Prostic indicated that if claimant responded favorably to medical treatment, she would be employable. Dr. Prostic indicated that if claimant had a good response to total knee replacement yet still had painful shoulders and weak hands there are some things that claimant could do. He indicated that if the comfort level in her hands and shoulders could be increased, the number of things claimant could do would be improved.

The Board finds respondent has rebutted the presumption that claimant is permanently and totally disabled. In making the aforementioned finding, the Board has considered the totality of claimant's circumstances, including her age, education and work experience. Simply put, claimant has failed to prove by a preponderance of evidence that the severity of the injuries to her upper extremities absent the subsequent injury to her left knee caused her to become permanently and totally disabled in Docket No. 1,013,328.

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<sup>20</sup> Prostic Depo. (Sept. 11, 2009), Ex. 2.

<sup>21</sup> *Id.*, at 23.

**Is claimant entitled to additional compensation for increased impairment to her left knee in Docket No. 1,024,037?**

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>22</sup> Claimant has the burden of proving the increased impairment to her left knee is attributable to her original injury.

Dr. Prostic opined that the increase in claimant's left knee impairment to a minimum of 50% was caused by a combination of her preexisting disease, her injury on December 8, 2004, and both repeated work after her injury and natural consequences of the preexisting disease.<sup>23</sup> The ALJ found the evidence of increase in claimant's left knee impairment uncontroverted and this Board concurs. Therefore, the Board finds that claimant has met her burden of proof that the increase in her left knee impairment was related to her work-related injury and that she has a 50% permanent impairment of the left knee.

**CONCLUSION**

1. Claimant is not permanently and totally disabled as a result of the work-related injuries in Docket No. 1,013,328.
2. Claimant is entitled to additional compensation in Docket No. 1,024,037 as the permanent impairment to her left knee has increased.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>24</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

**AWARD**

**WHEREFORE**, the Board modifies the January 26, 2011, review and modification Award entered by ALJ Klein as follows:

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<sup>22</sup> K.S.A. 2004 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>23</sup> Prostic Depo. (Sept. 11, 2009) at 11.

<sup>24</sup> K.S.A. 2010 Supp. 44-555c(k).

**Docket No. 1,024,037**

Eva. J. Twitchell is granted modification of her award for the increased functional impairment to her left leg. Ms. Twitchell is entitled to receive 15.15 weeks of temporary total disability benefits at \$283.23 per week, or \$4,290.99,<sup>25</sup> followed by 92.43 weeks of permanent partial disability benefits at \$279.75 per week, or \$25,857.29, for a 50% permanent partial disability to her left leg at the level of the knee, making a total award of \$30,148.28, which is all due and owing less any amounts previously paid.

The record does not contain a filed fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, she must file and submit her written contract with claimant to the ALJ for approval.

The Board adopts the remaining orders set forth in the January 26, 2011, Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant  
Paul M. Kritz, Attorney for Respondent  
Thomas Klein, Administrative Law Judge

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<sup>25</sup> This is 13.86 weeks of temporary total disability benefits plus the additional 1.29 weeks of temporary total disability benefits as set forth in the Board's July 17, 2007, Order.